Technolite Malaysia Sdn Bhd v Alfallah Cleantech (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-12BNCC-5–02 OF 2022
LIZA CHAN JC
5 MARCH 2023

Civil Procedure — Appeal — Appeal against decision of High Court — High Court allowed respondent's claim breach of contract for losses suffered against appellant — Whether reports adduced by appellant should be considered — Whether appellant was at fault for wrong installation — Whether there was representation made by appellant — Whether temperature at project site higher than temperature of lights could withstand — Whether there was causal connection between appellant's breach and respondent's loss

This was an appeal by the appellant ('defendant') emanated from the decision of the learned sessions court judge ('LSCJ') in allowing the respondent's ('plaintiff') claim against the defendant with costs after a full trial. In October 2017, the plaintiff approached the pefendant to purchase light emitting diodes ('LED') from the defendant. The purchase of the LED lights by the plaintiff was for the purpose of installing them on the façade of an office tower in Putrajaya ('the project'). Enquiries were made about a specific LED light, namely the VarioLED Flex Amor 827 SV IP67 lights ('VarioLED'), which the defendant sold. The defendant provided a copy of the catalogue of the VarioLED to the plaintiff ('the catalogue'). It was specified in the catalogue, amongst others, that the maximum ambient temperature of the VarioLED was 50°C. In August 2018, the plaintiff began installing the VarioLED it purchased from the defendant on the façade of the building for the project and the installation of the VarioLED was completed in December 2018. In November 2018, the plaintiff discovered that a large part of the VarioLED installed would not light up. The plaintiff informed the defendant of this and samples of the VarioLED were returned to the defendant for their inspection. The plaintiff filed a claim at the sessions court based on breach of contract for losses suffered. The plaintiff alleged that: (a) the VarioLED lights would be suitable for the project ('the representation'); (b) there was an implied term of contract that the VarioLED supplied would be suitable for the intended purpose; (c) the defendant supplied VarioLED lights that only had the maximum ambient temperature of 45°C and not 50°C as stated in the catalogue; and (d) the VarioLED lights supplied were defective and did not light up and the plaintiff had to replace the VarioLED lights. The defendant in its defence: (i) denied that it made any representation regarding the suitability of the VarioLED lights for the project; and (ii) denied that the VarioLED supplied was not in

accordance with description and specification stated in the catalogue. The defendant further contended that: (1) the sale of the VarioLed was a sale by description; there is no implied warranty on suitability and fitness for purpose; and (2) the failure of the VarioLED to light up was due to: (A) excessive force during the mounting of the VarioLED by the usage of small pieces of aluminium shims which caused damage to the inner components and the encapsulation material; and (B) the respondent's improper or wrong installation method. The defendant adduced two reports prepared by the manufacturer — SIRIM and LED Linear which respectively showed VarioLED operated beyond ambient temperature of 50°C and the cause of damage.

Held, allowing the appeal with costs:

(1) The plaintiff's postulations that there was no evidence to show the samples tested by SIRIM or the manufacturer were the same as those supplied to the plaintiff and the LSCJ's dismissal of the two reports based on these postulations were clearly indefensible, when in fact there was evidence that the samples tested by SIRIM or the manufacturer were the same as those supplied to the plaintiff. These two reports ought to prevail in that the SIRIM report revealed that the difference in label and catalogue matters not, and the LED Linear's report showed the cause of damage. But both reports were not considered by the LSCJ due to her insufficient appreciation of the evidence as a basis for rejecting the two reports. The evidence of SD1 from SIRIM who conducted the maximum ambient temperature tests was entitled to great respect particularly when the plaintiff did not adduce expert evidence of its own or any independent evidence to prove its case that the defendant did not supply VarioLED according to a maximum ambient temperature of 50°C or that the VarioLED supplied were defective. There was no evidence adduced by the plaintiff that the VarioLED supplied was only of 45°C and by failing to do so, the plaintiff had failed to discharge its 'burden of proof' under ss 101 and 102 of the Evidence Act. Consequently the 'onus of proof' did not shift to the defendant to dislodge the assertions made by the plaintiff as the claimant. The SIRIM finding which showed the VarioLED met and exceeded the max ambient temperature of 50°C as stated in the catalogue put paid, any suggestion by the plaintiff that the VarioLED supplied was only 45°C. The defendant as such had proven that the difference in label from what was stated in the catalogue had no significant bearing as the VarioLEDs supplied were capable of meeting and exceeding maximum ambient temperature of 50°C — the margin as required by the plaintiff was in fact met (see paras 13, 18, 20 & 22).

(2) SP1 admitted that the VarioLED were not installed according to drawing. Further, the LSCJ overlooked the fact that SD2 did inform the plaintiff that the installation was wrong; the defendant was merely the

supplier of the VarioLED and had no authority to stop the plaintiff from inserting the aluminum shims during installation, rather it was Sunway Construction as the main contractor that wanted aluminium shims installed; and it was not within the defendant's scope being a mere supplier to oversee installation (see paras 24 & 26).

(3) There was no evidence to show that the defendant gave any representation. The evidence showed it was inherently improbable that representations of fitness for purpose was made by the defendant to the plaintiff for the simple reason that the choice of lights was made by the lighting consultant or the employer. The defendant merely supplied the VarioLED and delivered it to the plaintiff. Implied fitness for purpose only arose if there was reliance on the skill and judgment, which was not the case here. The defendant had adduced clear evidence to support that it had only proposed VarioLED to the consultant. The LSCJ was plainly wrong to find it was the defendant who had recommended the VarioLED to the consultant and prepared the drawing. There was also simply no evidence to conclude that it was the defendant who had prepared the drawings (see paras 27, 28, 30–31 & 33).

(4) The plaintiff's contention that from a photograph the actual ambient temperature recorded at the Putrajaya project was 52°C was higher than the ambient temperature of the VarioLED lights could withstand, ie 45°C was absolutely misconceived. SD1 from SIRIM had explained ambient temperature was the air temperature that surrounded the test item; it was not the surface temperature. The photo taken by the plaintiff showing an alleged ambient temperature of 52°C remained doubtful due to: (a) the manner in which the plaintiff used to measure ambient temperature may not be accurate; (b) the photo taken was the surface temperature and not ambient temperature; (c) the thermometer's calibration and accuracy were not ascertained; and (d) the location and time when the temperature was taken was not evident (see para 35).

(5) There appeared no satisfactory evidence to prove the case on a balance of probabilities that the failure of the VarioLED to light up was due to defective VarioLED supplied. There was also no evidence adduced by the plaintiff that such allegations of wrongful installation were baseless or were irrelevant and did not have the consequences as contended by the plaintiff. Causation was not established. The findings by the LSCJ based on the evidence that the defendant had breached the contract by supplying defective VarioLED and that they did not meet the specification of a maximum ambient temperature of 50°C was clearly erroneous, and impeachable. These findings were against the weight of the evidence of SD1 and SD2 and the two reports. The LSCJ had misdirected herself in law when dealing with the evidence including the two reports. The LSCJ had clearly fallen into error in her insufficient

appreciation of the evidence and was plainly wrong in concluding that the plaintiff had proven its case on a balance of probabilities against the defendant. Her decision in allowing the plaintiff's claim was perverse and warranted appellate intervention (see paras 39–41 & 43).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu ('defendan') yang terhasil daripada keputusan hakim mahkamah sesyen yang bijaksana ('LSCJ') dalam membenarkan tuntutan responden ('plaintif') terhadap defendan dengan kos selepas perbicaraan penuh. Pada Oktober 2017, plaintif telah mendekati tertuduh untuk membeli diod pemancar cahaya ('LED') daripada defendan. Pembelian lampu LED oleh plaintif adalah untuk tujuan memasangnya di muka bangunan menara pejabat di Putrajaya ('projek'). Pertanyaan dibuat mengenai lampu LED khusus, iaitu lampu VarioLED Flex Amor 827 SV IP67 ('VarioLED'), yang dijual oleh defendan. Defendan memberikan salinan katalog VarioLED kepada plaintif ('katalog'). Ia telah dinyatakan dalam katalog, antara lain, bahawa suhu ambien maksimum VarioLED ialah 50°C. Pada Ogos 2018, plaintif mula memasang VarioLED yang dibeli daripada defendan pada muka depan bangunan untuk projek itu dan pemasangan VarioLED telah disiapkan pada Disember 2018. Pada November 2018, plaintif mendapati bahawa sebahagian besar VarioLED dipasang tidak menyala. Plaintif memaklumkan perkara ini kepada defendan dan sampel VarioLED telah dikembalikan kepada defendan untuk pemeriksaan mereka. Plaintif memfailkan tuntutan di mahkamah sesyen berdasarkan pelanggaran kontrak bagi kerugian yang dialami. Plaintif mendakwa bahawa: (a) lampu VarioLED adalah sesuai untuk projek itu ('representasi'); (b) terdapat terma kontrak tersirat bahawa VarioLED yang dibekalkan adalah sesuai untuk tujuan yang dimaksudkan; (c) defendan membekalkan lampu VarioLED yang hanya mempunyai suhu ambien maksimum 45°C dan bukan 50°C seperti yang dinyatakan dalam katalog; dan (d) lampu VarioLED yang dibekalkan rosak dan tidak menyala dan plaintif terpaksa menggantikan lampu VarioLED. Defendan dalam pembelaannya: (i) menafikan bahawa ia membuat sebarang representasi mengenai kesesuaian lampu VarioLED untuk projek itu; dan (ii) menafikan bahawa VarioLED yang dibekalkan tidak mengikut penerangan dan spesifikasi yang dinyatakan dalam katalog. Defendan seterusnya berhujah bahawa: (1) penjualan VarioLed adalah penjualan mengikut penerangan; tiada waranti tersirat mengenai kesesuaian dan ketahanan untuk tujuan; dan (2) kegagalan VarioLED menyala adalah disebabkan oleh: (A) daya yang berlebihan semasa pemasangan VarioLED oleh penggunaan kepingan kecil shim aluminium yang menyebabkan kerosakan pada komponen dalam dan bahan penutup; dan (B) kaedah pemasangan responden yang tidak betul atau salah. Defendan mengemukakan dua laporan yang disediakan oleh pengilang — SIRIM dan LED Linear yang masing-masing menunjukkan VarioLED beroperasi melebihi suhu ambien 50°C dan punca kerosakan.

Diputuskan, membenarkan rayuan dengan kos: A

(1) Pendapat plaintif bahawa tiada keterangan menunjukkan sampel yang diuji oleh SIRIM atau pengilang adalah sama seperti yang dibekalkan kepada plaintif dan penolakan LSCJ terhadap kedua-dua laporan berdasarkan pendapat ini jelas tidak dapat dipertahankan, sedangkan B sebenarnya terdapat keterangan bahawa sampel yang diuji oleh SIRIM atau pengilang adalah sama seperti yang dibekalkan kepada plaintif. Kedua-dua laporan ini sepatutnya diutamakan kerana laporan SIRIM mendedahkan bahawa perbezaan dalam label dan katalog tidak penting, dan laporan LED Linear menunjukkan punca kerosakan. Tetapi C kedua-dua laporan itu tidak dipertimbangkan oleh LSCJ kerana penghargaannya yang tidak mencukupi terhadap keterangan sebagai asas untuk menolak kedua-dua laporan itu. Keterangan SD1 daripada SIRIM yang menjalankan ujian suhu ambien maksimum berhak untuk dihormati terutamanya apabila plaintif tidak mengemukakan keterangan D pakar sendiri atau sebarang keterangan bebas untuk membuktikan kesnya bahawa defendan tidak membekalkan VarioLED mengikut suhu ambien maksimum 50°C atau VarioLED yang dibekalkan rosak. Tiada keterangan yang dikemukakan oleh plaintif bahawa VarioLED yang dibekalkan hanya bersuhu 45°C dan dengan kegagalan berbuat E demikian, plaintif telah gagal menunaikan 'beban pembuktiannya' di bawah ss 101 dan 102 Akta Keterangan. Akibatnya 'tanggungan pembuktian' tidak beralih kepada defendan untuk menolak penegasan yang dibuat oleh plaintif sebagai penuntut. Penemuan SIRIM yang menunjukkan VarioLED memenuhi dan melebihi suhu ambien F maksimum 50°C seperti yang dinyatakan dalam katalog menolak, sebarang cadangan plaintif bahawa VarioLED yang dibekalkan hanyalah 45°C. Defendan oleh itu telah membuktikan bahawa perbezaan dalam label daripada apa yang dinyatakan dalam katalog tidak mempunyai kaitan yang ketara kerana VarioLED yang dibekalkan mampu G memenuhi dan melebihi suhu ambien maksimum 50°C — margin seperti yang dikehendaki oleh plaintif adalah sebenarnya ditepati (lihat perenggan 13, 18, 20 & 22).

(2) SP1 mengakui bahawa VarioLED tidak dipasang mengikut lukisan. H Selanjutnya, LSCJ terlepas pandang bahawa SD2 telah memaklumkan plaintif bahawa pemasangan itu salah; defendan hanyalah pembekal VarioLED dan tidak mempunyai kuasa untuk menghalang plaintif daripada memasukkan shim aluminium semasa pemasangan, sebaliknya Sunway Construction sebagai kontraktor utama yang mahukan shim I aluminium dipasang; dan ia bukan dalam skop defendan sebagai pembekal semata-mata untuk mengawasi pemasangan (lihat perenggan 24 & 26).

(3) Tiada keterangan untuk menunjukkan bahawa defendan memberikan

apa-apa representasi. Ketreangan menunjukkan ia sememangnya mustahil bahawa representasi ketahanan untuk tujuan dibuat oleh defendan kepada plaintif atas alasan mudah bahawa pilihan lampu dibuat oleh perunding pencahayaan atau majikan. Defendan hanya membekalkan VarioLED dan menyerahkannya kepada plaintif. Kesesuaian tersirat untuk tujuan hanya timbul jika terdapat pergantungan pada kemahiran dan pertimbangan, yang tidak berlaku di sini. Defendan telah mengemukakan keterangan yang jelas untuk menyokong bahawa ia hanya mencadangkan VarioLED kepada perunding. LSCJ jelas salah apabila mendapati defendan yang telah mengesyorkan VarioLED kepada perunding dan menyediakan lukisan itu. Juga tiada keterangan untuk membuat kesimpulan bahawa defendan yang telah menyediakan lukisan itu (lihat perenggan 27, 28, 30–31 & 33).

(4) Pendapat plaintif bahawa daripada gambar suhu ambien sebenar yang direkodkan di Projek Putrajaya ialah 52°C adalah lebih tinggi daripada suhu ambien lampu VarioLED mampu bertahan, iaitu 45°C adalah salah sangka sama sekali. SD1 dari SIRIM telah menjelaskan suhu ambien ialah suhu udara yang mengelilingi item ujian; ia bukan suhu permukaan. Gambar yang diambil oleh plaintif yang menunjukkan suhu ambien yang dikatakan 52°C kekal diragui kerana: (a) cara yang digunakan oleh plaintif untuk mengukur suhu ambien mungkin tidak tepat; (b) gambar yang diambil ialah suhu permukaan dan bukan suhu persekitaran; (c) penentukuran dan ketepatan termometer tidak dapat dipastikan; dan (d) lokasi dan masa apabila suhu diambil tidak jelas (lihat perenggan 35).

(5) Tidak terdapat keterangan yang memuaskan untuk membuktikan kes pada keseimbangan kebarangkalian bahawa kegagalan VarioLED menyala adalah disebabkan oleh VarioLED yang dibekalkan rosak. Juga tiada keterangan yang dikemukakan oleh plaintif bahawa dakwaan pemasangan yang salah adalah tidak berasas atau tidak relevan dan tidak mempunyai akibat seperti yang dipertikaikan oleh plaintif. Kausa tidak dibuktikan. Penemuan oleh LSCJ berdasarkan keterangan bahawa defendan telah melanggar kontrak dengan membekalkan VarioLED yang rosak dan bahawa mereka tidak memenuhi spesifikasi suhu ambien maksimum 50°C adalah jelas terkhilaf, dan boleh dicabar. Penemuan ini bertentangan dengan pemberatan keterangan SD1 dan SD2 dan kedua-dua laporan. LSCJ telah tersalah arah dalam undang-undang apabila berurusan dengan keterangan termasuk dua laporan. LSCJ jelas terkhilaf dalam penghargaan keterangan yang tidak mencukupi dan jelas salah dalam membuat kesimpulan bahawa plaintif telah membuktikan kesnya berdasarkan imbangan kebarangkalian terhadap defendan. Keputusannya membenarkan tuntutan plaintif adalah salah dan memerlukan campur tangan rayuan (lihat perenggan 39–41 & 43).]

Cases referred to

Al Sharhan Sdn Bhd & Anor v Edipro Construction & Engineering [2021] 10 MLJ 585; [2020] 1 LNS 1046, HC (refd)
Ang Beng Teik v Pan Global Textile Bhd, Penang [1996] 3 MLJ 137, CA (refd)
Ayoromi Helen v Public Prosecutor [2005] 1 MLJ 699; [2005] 1 CLJ 1, CA (refd)
Clariant Masterbatches (M) Sdn Bhd v Prestige Dynamics Industries Sdn Bhd [2019] 3 MLJ 701, CA (refd)
Gabungan Sumber Tenaga Sdn Bhd v Alliance General Insurance Company (Malaysia) Bhd [2022] MLJU 111, HC (distd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)
Global Mix Sdn Bhd v Wong Brothers Building Construction Sdn Bhd [2015] MLJU 616, HC (refd)
Keruntum Sdn Bhd v The Director of Forests & Ors [2017] 3 MLJ 281; [2017] 4 CLJ 676, FC (refd)
Linklaters Business Services v Sir Robert Mcalpine Ltd and another [2010] EWHC 2931, KBD (refd)
Malayan Banking Bhd v PK Rajamani [1994] 1 MLJ 405, SC (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 1 LNS 1060, FC (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)
Robertson Quay Investment Pte Lt v Steen Consultants Pte Ltd and Another [2008] SGCA 8, CA (refd)
Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (M) Bhd [2004] 2 MLJ 31; [2004] 1 CLJ 532, CA (refd)
Syed Abu Bakar bin Ahmad v PP [1984] 2 MLJ 19, FC (refd)

Legislation referred to

Evidence Act 1950 ss 42, 45, 101, 102
Sale of Goods Act 1957 ss 16(a), 59

Lee Jing Min (with Kelvin Ng) (Vin Carmen Cheng) for the appellant.
Aw Kai Xiang (with Melody Tham Cheng Yee) (Raj, Ong & Yudistra) for the respondent.

Liza Chan JC:

INTRODUCTION

[1] This appeal by the appellant emanated from the decision of the learned sessions court judge ('LSCJ') dated 11 February 2022 in allowing the respondent's claim against the appellant with costs after a full trial.

[2] In this judgment, the parties will be referred to as they were in the sessions court. In the court below, the appellant herein was the defendant, whilst the respondent was the plaintiff.

[3] On 3 January 2023, I allowed the defendant's appeal with costs. These are the reasons as to why.

BACKGROUND

[4] The background facts are agreed facts:

(a) in October 2017, the plaintiff approached the defendant to purchase light emitting diodes ('LED') from the defendant;

(b) the purchase of the LED lights by the plaintiff was for the purpose of installing them on the façade of an office tower in Putrajaya (the 'project');

(c) enquiries were made about a specific LED light, namely the VarioLED Flex Amor 827 SV IP67 lights ('VarioLED'), which the defendant sells;

(d) the defendant provided a copy of the catalogue of the VarioLED to the plaintiff ('catalogue');

(e) it was specified in the catalogue, amongst others, that:

(i) the maximum ambient temperature of the VarioLED is 50°C; and

(ii) the VarioLED have high resistance to salt water and is UV resistance.

(f) on 5 April 2018, the defendant sent the plaintiff a quotation for the VarioLED;

(g) the plaintiff then placed a purchase order based on the quotation;

(h) the details of the purchase order are as follows:

No	Quotation	Date	Purchase Order	Date	Price (RM)	Purchase Order Number
1	First quotation	5 April 2018	First Purchase Order	10 April 2018	568,684.70	ACT-PO-118

(i) the contract between the plaintiff and defendant was formed when the plaintiff placed the first purchase order based on the first quotation provided by the defendant;

(j) the express terms of the contract are as follows:

(i) the defendant shall supply the plaintiff the VarioLED;

(ii) the plaintiff shall pay the defendant for the VarioLED supplied; and

(iii) the VarioLED supplied will be according to the description and specifications stated in the catalogue.

(k) the plaintiff paid the defendant for the VarioLED for the first purchase order as follows:

No	Purchase Order	Date of payment	Amount (RM)	Payment method
1	First purchase order:			
	(a) First 50% of the total purchase price.	17 April 2018	284,342.35	Cheque dated 12 April 2018
	(b) Second 50% of the total purchase price.	22 June 2018	269,897.50	Cheque dated 21 June 2018

(l) the VarioLED purchased by the plaintiff pursuant to the first purchase order was delivered to the plaintiff on 27 August 2018;

(m) in August 2018, the plaintiff began installing the VarioLED it purchased from the defendant on the façade of the building for the project;

(n) sometime in August 2018, the plaintiff informed the defendant that some of the VarioLED could not light up;

(o) upon the plaintiff's request, the defendant sent a second and third quotation;

(p) the plaintiff then issued a second and third purchase order based on the two new quotations;

(q) the details of the two new quotations and the second purchase order and the third purchase order are as follows:

No	Quotation	Date	Purchase Order	Date	Price (RM)	Purchase Order Number
1	Second quotation	18 September 2018	Second purchase order	22 September 2018	64,976	ACT-PO-149
2	Third quotation	7 September 2018	Third purchase order	22 September 2018	12,170	ACT-PO-150

(r) the contract for the second purchase order and third purchase order was formed when the plaintiff placed the second purchase order and third purchase order based on the two new quotations provided by the defendant;

(s) the details of the payment made by the plaintiff to the defendant for the second purchase order and third purchase order are as follows:

No	Purchase Order	Date of payment	Amount (RM)	Payment method
1	Second purchase order and third purchase order	31 October 2018	77,146	Cheque dated 26 October 2018

(t) the VarioLED purchased by the plaintiff pursuant to the second purchase order and third purchase order were delivered to the plaintiff on 29 October 2018;

(u) installation of the VarioLED on the façade of an office tower for the project was completed in December 2018;

(v) in November 2018, the plaintiff discovered that a large part of the VarioLED installed on the façade of the tower in Putrajaya, for the project would not light up. So, it informed the defendant of this; and

(w) samples of the VarioLED were returned to the defendant for their inspection.

THE PLAINTIFF'S CASE

[5] The plaintiff filed a claim at the sessions court on 8 May 2020 based on breach of contract for losses suffered in the sum RM634,845.85 made up of the sum of RM605,017.85 paid to the defendant for the VarioLED and a further sum of RM 29,828 being costs of installation and removal of the VarioLED. In summary, the plaintiff alleged that:

(a) the VarioLED lights would be suitable for the Putrajaya project (the 'representation');

(b) there is an implied term of contract that the VarioLED supplied would be suitable for the intended purpose;

(c) the defendant supplied VarioLED lights that only have the maximum ambient temperature of 45°C and not 50°C as stated in the catalogue; and

(d) the VarioLED lights supplied were defective and did not light up. The plaintiff had to replace the VarioLED lights with Acolyte Static White Series Ribbonlyte 3.0 lights ('Acolyte lights'). These Acolyte lights installed using the aluminium shims worked.

[6] The defendant in its defence in summary:

(a) denied that it made any representation regarding the suitability of the VarioLED lights for the project;

(b) denied that the VarioLED supplied was not in accordance with description and specification stated in the catalogue;

(c) further contended that:

(i) the sale of the VarioLed was a sale by description; there is no implied warranty on suitability and fitness for purpose;

(ii) the failure of the VarioLED to light up was due to:

(1) excessive force during the mounting of the VarioLED by the usage of small pieces of aluminium shims which caused damage to the inner components and the encapsulation material; and

(2) the respondent's improper or wrong installation method.

DECISION OF THE SESSIONS COURT

[7] The learned SCJ ('LSCJ') held that she need only consider one issue whether the defendant has supplied the lights in accordance with contract — para 14 of her grounds of judgment ('SCGOJ'). The LSCJ found that:

(a) there is an implied term as to fitness for purpose and that the defendant had breached the same — at [15], SCGOJ;

(b) in a sale by description, the defendant has a responsibility to ensure that the lights ordered by the plaintiff based on description given by the plaintiff should be delivered according to the catalogue and the representation provided by the plaintiff and relied on *Clariant Masterbatches (M) Sdn Bhd v Prestige Dynamics Industries Sdn Bhd* [2019] 3 MLJ 701 — at [20], [21] SCGOJ.

(c) the plaintiff ordered lights with a maximum ambient temperature of 50°C. SD2 (Yap) admitted in evidence that the lights supplied and paid for were not according to specification; he further admitted that the defendant supplied the lights with a maximum ambient temperature of 45°C and not as depicted and stated in the catalogues given by the defendant to the plaintiff — at [22] SCGOJ;

(d) there was a representation made by the defendant and that the plaintiff had relied on the representation to purchase the VarioLED; it was the defendant who first recommended the use of specific VarioLED lights for the Putrajaya project. So, the VarioLED lights must be suitable for the Putrajaya project — at [23] SCGOJ; and

(e) the lights supplied being not in accordance with specifications, amounts to a breach of s 59 of the Sale of Goods Act 1957 ('the SOSA 1957') — at [24] SCGOJ.

[8] The LSCJ in rejecting the defence that the VarioLED failed to light up

was due to the plaintiff's improper or wrong installation method further found that the two reports prepared by the manufacturer — LED Linear and SIRIM adduced by the defendant to show that the VarioLED lights supplied by defendant to plaintiff are not defective and complied with specifications were irrelevant because there was no evidence produced by the defendant to show that:

(a) the reports were prepared based on the same samples of VarioLED lights delivered to plaintiff; and

(b) the test of the VarioLED lights was carried out at the Putrajaya project site — at [16], [19] SCGOJ;

[9] The LSCJ as such found for the plaintiff and entered judgment for the plaintiff.

LAW ON APPELLATE INTERVENTION

[10] In *Al Sharhan Sdn Bhd & Anor v Edipro Construction & Engineering* [2021] 10 MLJ 585; [2020] 1 LNS 1046, I have discussed the fundamental principles pivotal to be borne in mind by an appellate court in hearing an appeal from a judgment of the trial court:

> [7] In hearing this appeal, this court as an appellate court is reminded that it should be slow to interfere with the findings of fact of a trial judge. Reference is made to *China Airlines Ltd v Maltra Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163 where the Federal Court at p 175 said:
>
> > It is a settled principle of law that in an appeal, where facts have to be reviewed, it is undesirable that the findings of the court below should be disturbed by a court of appeal unless it appears that those findings are clearly wrong, and more especially that it is undesirable to do so where the conclusion reached must to a large extent depend on the credibility of the witnesses and the impression formed by a court which has seen them and can judge their honesty and accuracy.
>
> [8] In *Lee Chee Keong v Fadason Holdings Sdn Bhd* [2017] MLJ 728, the Court of Appeal citing the judgment of Nallini Pathmanathan JCA (now FCJ) in *MMC Oil & Gas Engineering Sdn Bhd v Tan Boon Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428 held that appellate interference is only warranted where no reasonable judge could have reached the same conclusion of the trial judge:
>
> > [15] This is a point of some importance because it underscores the rationale that the appellate court is not at liberty to reverse or interfere in the finding of a trial judge even if the appellate court is clearly of the view that it would not have reached the conclusion the trial judge did on the evidence on record before it. It requires something more. The requisite or correct standard to be applied is that no reasonable judge, on the evidence on record, could have reached the conclusion of the trial judge. In other words, so long as the findings of the trial judge are plausible on the evidence on record, there is no room for interference

merely on the grounds that the appellate court forms a different opinion on the same evidence. A

[9] The Federal Court in *Ming Holdings (M) Sdn Bhd v Tuan Syed Azahari bin Noh Shahabudin & Anor* [2010] 4 MLJ 577 at pp 591 to 593; [2010] 6 CLJ 857 at pp 873 to 875 had this to say: B

> [41] Before we leave this subject and move on to the next two questions, *we feel a need to remind that a trial judge has the advantage over an appellate court in hearing the witness and observing his demeanour. Thus, unless the trial judge is plainly wrong in his finding, the appellate court should not reverse a finding of fact by the trial judge.* This 'plainly wrong' test has been long established and can be observed in the Judicial Committee of the Privy Council pronouncement in *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41; [1978] 1 LNS 32 where Lord Fraser said: C
>
> > In the face of that finding by the trial judge on the question of fact the Federal Court were *only entitled to displace his conclusion if they were satisfied that his view was plainly wrong and that any advantage which he enjoyed by having seen and heard the witness was not sufficient to explain his conclusion*, as the authorities already quoted show. D
>
> [42] Before stating this, Lord Fraser cited two cases in support which we find appropriate to repeat as a reminder to all appellate courts of their role in dealing with a finding of fact by a trial judge. E
>
> [43] The first is *Lord Tankerton in Watt or Thomas v Thomas* [1947] AC 487:
>
> > (a) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself as a judge, an appellate court which is disposed to come to a different conclusion on printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion. F
> >
> > (b) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. G
> >
> > (c) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen or heard the witnesses, and the matter will then become at large for the appellate court. H
>
> [44] The second is from Viscount Sankey LC in Streatham Manor Nursing Home [1935] AC 36, 36 who said: I
>
> > *... it is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses.* It only reads the evidence and rehears the counsel. Neither is it reseeing the court. There are different meanings to be attached to the word 'rehearing'. For

example, the rehearing at the Quarter Sessions is a perfect rehearing because, although it may be the defendant who is appearing, the complainant starts again and has to make out his case and call his witnesses. The matter is rather different in the case of an appeal to the Court of Appeal. There the onus is upon the appellant to satisfy the court that his appeal should be allowed. There have been a very large number of cases in which the law on this subject has been canvassed and laid down. There is a difference between the manner in which the Court of Appeal deals with a judgment after trial before a judge alone, the Court of Appeal will not set aside the judgment unless the appellant satisfies the court that the judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence the Court of Appeal will have special regard to the fact that the trial judge saw the witnesses: see Clarke v Edinburgh Tramways Co: per Lord Shaw, 1919 SC (HC) pp 35–36, where he says:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observation with regard to creditability or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In the courts of justice in the ordinary case things are much more evenly divided; witness without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in their nuance, of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed pages. What in such circumstances, thus psychologically put, is the duty of the appellate court? In my opinion, the duty of the appellate court in those circumstances is for each judge of it to put himself, as I now do in this case, the question: Am I who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

[45] The above principle is reiterated by this court in *Gan Yook Chin & Anor v Lee Ing Chin & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309. (Emphasis added.)

[10] The Court of Appeal has also in the case of *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 clearly stated that:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one

may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[11] It is also trite that apart from a wrong application of the law, insufficient judicial evaluation of the evidence also justifies appellate intervention — *Lee Ing Chin & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 where the Court of Appeal speaking through Gopal Sri Ram JCA (as he then was), stated the need to assess the evidence and to weigh them and for good reasons accept or reject them accordingly, as follows:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves. *A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him.* He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same. (Emphasis added.)

[12] The above statement of law on the need to assess, weigh and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before the Court was affirmed by the Federal Court in *Gan Yook Chin & Anor v Lee Ing Chin & Ors* where the Federal Court said:

> [14] In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention, ie that *a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal*. This is consistent with the established plainly wrong test.

[11] In *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate*

of Tan Ewe Kwang, deceased) & Ors [2020] 12 MLJ 67; [2020] 1 LNS 1060 (FC), Zabariah Mohd Yusof FCJ held at [152] that to justify interference with the trial judge's findings of fact, the appellate court has to undertake the appropriate review exercise and make the appropriate determination that the trial judge had gone plainly wrong in his decision, in the sense that it could not reasonably be explained or justified and so was one which no reasonable judge could have reached.

DECISION OF THIS COURT

[12] I deal with the main grounds of appeal which in my view will resolve the appeal.

SIRIM and LED Linear (the manufacturer)'s reports disregarded

[13] SIRIM and LED Linear (interchangeably 'the manufacturer')'s reports which respectively showed VarioLED operated beyond ambient temp of 50°C and the cause of damage were disregarded by the LSCJ in para 19 of the SCGOJ on the ground that they were irrelevant as there is no evidence to show the samples tested by SIRIM or the manufacturer were the same as those supplied to the plaintiff. The plaintiff, in attempting to cling on to this finding, postulated three times in arguing this appeal in its submissions in encl 12, encl 19, and at encl 24 that there is no evidence to show the samples tested by SIRIM or the manufacturer were the same as those supplied to the plaintiff but these postulations do not resonate with this court as, the hard reality is, such postulations and the LSCJ's dismissal of the two reports based on this postulations are clearly indefensible, when in fact there is evidence that the samples tested by SIRIM or the manufacturer were the same as those supplied to the plaintiff:

(a) in evidence-in-chief at Q&A 16, SD2 testified that he sent some of the lights that did not light up to the *manufacturer* for testing on 5 September 2018. The investigation result was made known as early as 22 November 18;

(b) SD2's witness statement Q&A 24 where he testified — two samples were taken from those VarioLED which the plaintiff purchased and were sent to *SIRIM*; and

(c) SD2 repeated the above again at Q&A 29.

[14] In cross-examination, the plaintiff did not challenge SD2 whether the samples were obtained from the site but rather was on whether all the lights were given to the manufacturer:

Notes of Proceedings 17 November 2021, page 287 Record of Appeal Bahagian B Jilid 2

CAR: Ok, you only gave a sample, the sample and not all the lights, correct? A

YAP: The sample of which, the product?

CAR: Yes, the sample of the product, the VarioLED Lights.

YAP: *The sample was retrieved from the site*.

CAR: *Correct, but only a sample was given, not all the lights*, correct? B

YAP: Yes, a sample was given them.

[15] Thus, SD2 Yap's unchallenged evidence that samples of the lights which purportedly failed were given to the manufacturer and SIRIM ought to be accepted — see *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (M) Bhd* [2004] 2 MLJ 31; [2004] 1 CLJ 532 and *Ayoromi Helen v Public Prosecutor* [2005] 1 MLJ 699; [2005] 1 CLJ 1, where in the latter case, the Court of Appeal held that 'failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony'. It should not matter that SD1 who was handed the lights by SD2 did not go physically to the site to retrieve samples for testing. C D

[16] Insufficient judicial appreciation of the evidence undermined the integrity of the decision-making process and justifies appellate intervention. The case of *Gabungan Sumber Tenaga Sdn Bhd v Alliance General Insurance Company (Malaysia) Bhd* [2022] MLJU 11, cited by the plaintiff, decided by me and affirmed by the Court of Appeal, is to be distinguished as there, the evidence led, show that the battery produced to the alleged expert came from a third party. Here, SIRIM in fact did the endurance and thermal test pp 507 to 521 *Jld* 2A of appeal record on actual sample taken from those which the plaintiff purchased which in fact revealed the VarioLED can withstand maximum ambient temperature of 55°C. E F

[17] The plaintiff pressed the argument that the testing of the VarioLed was not carried out by LED Linear and SIRIM at the Putrajaya project site, under actual conditions, which found favour with the LSCJ. But such assertion when weighed against the plaintiff's own failure to conduct any third party and/or independent testing to counter the reports from LED Linear and SIRIM, OR show that the non-testing on site will have an effect or bearing on the outcome of the two reports, there is plainly no scientific or other sound basis for the plaintiff to suggest VarioLED lights must be tested at the project site. This argument also does not assist the plaintiff's case for reasons as follows: G H I

(a) the plaintiff did not challenge the procedure in conducting the SIRIM test found in SD1 Mohd Azmeer bin Ahmad's witness statement Q&A 14–25;

(b) SP1 admitted that the damage was due to the insertion of aluminium shims and that the plaintiff did not challenge the manufacturer's reports which must be reiterated, was given to the plaintiff as long ago in November 2018; and

(c) the plaintiff further, did not challenge the SIRIM report until trial.

[18] These two reports ought to prevail in that the SIRIM report reveals that the difference in label and catalogue matters not, and LED Linear's report show the cause of damage. LED Linear's report found excessive force were used to mount the lights by using aluminium shims that damaged the components and encapsulation material. The die is cast when the plaintiff did not challenge these reports. But both reports were not considered by the LSCJ due to her insufficient appreciation of the evidence as a basis for rejecting the two reports. More so, the reports are to be considered due to the technical nature of the complaint whether the maximum ambient temperature was met to assist the LSCJ in coming to a decision (see *Syed Abu Bakar bin Ahmad v Public Prosecutor* [1984] 2 MLJ 19 (FC). Although fully aware of the defendant's two reports, the plaintiff did not produce their own in rebuttal. Whilst it is true that it is permissible in law for the plaintiff to rebut the defendant's case by cross-examining the latter's witnesses including the defendant's expert witness — *Keruntum Sdn Bhd v The Director of Forests & Ors* [2017] 3 MLJ 281; [2017] 4 CLJ 676 at [78], however, here, the plaintiff was not able to prove that the defendant supplied VarioLED lights that only have the maximum ambient temperature of 45°C and not 50°C as stated in the catalogue. In this regard, SD1 from SIRIM who conducted the maximum ambient temperature tests, even IF as alleged by the plaintiff that he cannot be characterised as an expert under s 45 of the Evidence Act 1950, yet as a witness of fact, his evidence must carry significant weight for the simple reason that he has no interest in the outcome of the case, clearly has no motive to give any biased evidence and the court should treat him as an independent witness of truth with nothing to gain. His evidence is therefore entitled to great respect particularly when the plaintiff did not adduce expert evidence of its own or any independent evidence to prove its case that the defendant did not supply VarioLED according to a maximum ambient temperature of 50°C or that the VarioLED supplied were defective. The approach of the plaintiff and the LSCJ was with respect, clearly oversimplistic in attaching much weight to the label of 45°C rather than to substance.

[19] The question is what exactly had the parties bargained for in the contract and what did the defendant supply? With utmost respect, the evidence when weighed properly, underscores substance over label. The particular complaint is that the VarioLED is supposed to meet but alleged to have failed to meet is a maximum ambient temperature of 50°C. The plaintiff as proof that the defendant is in breach, tendered a photograph taken of the label on the

VarioLED lights supplied by the defendant (at p 443 of the record of appeal, Part C, Volume 2A). The label of the VarioLED supplied says 'suitable in ambient not exceeding 45°C'. It was contended by the plaintiff that SD2 had admitted that the VarioLED lights supplied only have the maximum ambient temperature of 45°C but a close examination of the notes of proceedings from lines 23–37 at p 271 of the record of appeal, Part B clearly stated SD2 only agreed 'Label, Yes' at line 36.

[20] In my utmost respectful view, the label is inconsequential, and at best of little legal significance unless there is direct evidence adduced by the plaintiff that the VarioLED supplied was only of 45°C. Here in the instant case, there is no such admissible evidence adduced and by failing to do so, the plaintiff had failed to discharge its 'burden of proof' under ss 101 and 102 of the Evidence Act. Consequently the 'onus of proof' did not shift to the defendant to dislodge the assertions made by the plaintiff as the claimant. There is simply no reason not to look behind the label to the substance. In the sage words of Gopal Sri Ram JCA (as he then was) in the very first sentence of the judgment in *Ang Beng Teik v Pan Global Textile Bhd, Penang* [1996] 3 MLJ 137, His Lordship stated:

> The law is filled with cases where a miscarriage of justice has occurred because regard is had to labels and not substance.

[21] Similarly, Mohamed Dzaiddin SCJ in *Malayan Banking Bhd v PK Rajamani* [1994] 1 MLJ 405 (SC), at p 410 said:

> ... The law will always look beyond the terminology of the document to the actual facts of the situation and it is no longer a question of words but substance (see *Woo Yew Chee v Yong Yong Hoo* [1979] 1 MLJ 131 and *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513; [1957] 3 All ER 563; [1957] 3 WLR 980).

[22] Even assuming for one moment 'the label' which says the VarioLED is of maximum ambient temperature of 45°C is sufficient evidence, in fact the plaintiff received VarioLED lights of maximum ambient temperature of 55°C as stated by SIRIM's report which showed the VarioLED met and exceeded the max ambient temperature of 50°C as stated in the catalogue. In my respectful view, this SIRIM finding puts paid, any suggestion by the plaintiff that the VarioLED supplied was only 45°C. The defendant as such had proven that the difference in label from what is stated in the catalogue has no significant bearing as the VarioLEDs supplied were capable of meeting and exceeding maximum ambient temperature of 50°C — the margin as required by the plaintiff was in fact met.

WRONG INSTALLATION?

[23] The defendant led evidence to show the plaintiff did not install the VarioLED according to its original construction drawings; the VarioLED were

inserted into aluminium capping which were too big and a different size from the drawings which says dimension of gap in aluminium capping is 4.8, 4.9mm with a maximum of 5mm but was in fact 6mm and aluminium shims had to be inserted into the gap to hold the VarioLED in place.

[24] SP1 ('Liu') the only witness called by the plaintiff admitted that the VarioLED were not installed according to drawing:

Notes of Proceedings 16 November 2021, page 184 — 189 Record of Appeal Bahagian B Jilid 2

NCY: Could you tell the Court what document is this?

LIU: This is a shop drawing of aluminium cap but this is not from us.

NCY: Sure. When you say shop drawing, what do you mean?

LIU: It's a drawing that described the exact dimension of the aluminium capping.

NCY: *Would you agree that from the drawing here, it says that the gap is between 4.8 to 4.9mm, 5mm maximum. Do you agree with that*?

LIU: *Yes*.

NCY: So that is the design spec. Would you agree?

LIU: Yes, but it's not from us.

NCY: Very well. I'm not saying it's from you. I already asked you whether you installed and supplied, you said it's not from you and it's not in your scope. I understand.

LIU: Yes.

NCY: *So the spec says 5mm maximum. Correct?*

LIU: *Yes.*

NCY: You agree with my suggestion that when David was there on site, when the defendant was there on site, he showed you photographs showing the gap was actually more than 5mm?

LIU: No.

NCY: Did not?

LIU: No.

NCY: Page 9 defendant document. This is the same WhatsApp conversation, Mr Liu, from the same WhatsApp group.

LIU: Yes.

NCY: *So what we have here is a message from David to the group showing a measurement that the internal gap is 6mm. Would you agree?*

LIU: *Yes.*

NCY: *You agree you received this as well. Correct?*

LIU: *Yes.*

NCY: It's in the conversation in the group. Correct?

LIU: This picture was not taken at the site, the actual installation. This picture was taken at a table top.

NCY: Sure, ok. *Would you agree that it was taken showing the aluminium capping that was used on site?*

LIU: *Yes.*

NCY: Now so it seems, Mr Liu, that the defendant did tell you that the gap was not in accordance with the specs. Do you agree?

LIU: Please repeat the question.

NCY: I just showed you the document. I showed you the specs. And then I showed you David giving you a picture of the measurement. *So, I'm suggesting to you that actually the defendant did tell you that the aluminium capping was not designed to spec. Would you agree with me now?*

LIU: *Yes.*

[25] There was also the misalignment of the aluminium capping installed by a third party.

[26] Instead of considering the above evidence, however, the LSCJ rather found fault that SD2 although present during installation did not inform the plaintiff that the installation was wrong; did not stop the plaintiff from inserting the aluminum shims in installation, nor stop the plaintiff from purchasing more VarioLED. In so doing, overlooked that in fact:

(a) SD2 did inform the plaintiff that the installation was wrong — to the whatsapp group as admitted by SP1 and alluded to in para 24 above;

(b) the defendant was merely the supplier of the VarioLED and have no authority to stop the plaintiff from inserting the aluminum shims during installation; it was Sunway Construction, the main contractor that wanted aluminium shims installed;

(c) in any event, there is no denying that the aluminium capping was too large, not according to the drawings and it is not within the defendant's scope being a mere supplier, to oversee installation; and

(d) there is also uncontroverted evidence that the defendant had advised/proposed to the plaintiff against inserting the aluminum shims and to use soft Nitto Rubber Foam which was ignored.

Sale by description of the VarioLED contained representation as to fitness for purpose

[27] As for para 20 of SCGOJ that a sale by description contained representations as to fitness for purpose, the finding in para 15 that the transaction included an implied term as to fitness for purpose, para 21 that it is

A the defendant's responsibility to ensure that the VarioLED shall be supplied according to representation, para 23 that there was a representation given by the defendant and that the plaintiff had relied on the representation to purchase the VarioLED, it appears to me anyhow, there was no evidence to show the defendant gave any representation. The alleged representation was
B imploded by SP1's admission:

> NOP @ Page 176, ROA Bahagian B Jilid 2
>
> NCY: Insofar we are concerned, the defendant never recommended the VarioLED to you, the plaintiff. Agree?
>
C LIU: Yes.

[28] The evidence when evaluated properly, show it is inherently improbable that representations of fitness for purpose was made by the defendant to the
D plaintiff for the simple reason that the choice of lights was made by the lighting consultant ('Lightwave Lighting Design Sdn Bhd') or the employer. The specifications for VarioLED was in the tender documents, the choice of VarioLED was made by employer/or the consultant. The defendant here merely supplied the VarioLED and delivered it to the plaintiff. Without more,
E the defendant cannot be expected to ensure that it meets the requirement of the employer. In this regard, where an employer has specified materials/goods to be used, there is no warranty by the contractor as to fitness for purpose of the materials or goods following *Linklaters Business Services v Sir Robert Mcalpine Ltd and another* [2010] EWHC 2931 (TCC). Additionally, in *Global Mix Sdn*
F *Bhd v Wong Brothers Building Construction Sdn Bhd* [2015] MLJU 616, paras [117]–[118], a decision of Mary Lim J (now FCJ), Her Ladyship held there, that a subcontract does not have implied warranty and fitness for purpose as workmanship and manner in which the concrete was used and placed are obligations of the main contractor. Both these cases were brought to
G this court's attention by the defendant's counsel.

[29] The defendant in this case was a mere subcontractor engaged by the plaintiff to supply the lights. Added to that, the lights were sold by the defendant as distributor to the plaintiff under the patent name VarioLed — the
H proviso as to fitness for purpose under s 16(a) of the Sale of Goods Act 1957 applies. It reads 'Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose'.

I **[30]** I agree with the defendant's submission that implied fitness for purpose only arise if there is reliance on the skill and judgment eg in a design and built contract, which is not the case here.

[31] The defendant had adduced clear evidence to support that it had only

proposed VarioLED to the consultant (as opposed to the plaintiff): A

> '... We would like to propose LED Linear Amor Flex (as attached). May I have your opinion?' (page 685 of Jilid 2B Record of Appeal — Bahagian C).

[32] Ultimately, it was the consultant/owner who decided to use VarioLED. B

[33] The sessions court judge is plainly wrong to find it was the defendant who had recommended the VarioLED to the consultant and prepared the drawing. There was also simply no evidence to conclude that it was the defendant who had prepared the drawings. C

[34] As for the plaintiff's posit that Acolyte lights worked with the use of aluminum shims, I am of the view that this argument does not justify a conclusion that VarioLED is not suitable. And such an argument does not add to the plaintiff's case as the plaintiff's own evidence show it was the plaintiff who had asked the defendant on the lights to replace the VarioLED: D

> Notes of Proceedings 17 November 2021, page 281 Jilid 2 Record of Appeal — Bahagian B)
>
> CAR: Plaintiff then asked defendant what lights should we use to replace the VarioLED lights? E
>
> YAP: Yes.
>
> CAR: And defendant suggested using Acolyte lights?
>
> YAP: Yes. F

Temperature of the Putrajaya project is 52°C?

[35] The plaintiff contended from a photograph that the actual ambient temperature recorded at the Putrajaya project site on 3 November 2018, at p 441 of the record of appeal, Part C, Volume 2A showing 52°C is higher than the ambient temperature of the VarioLED lights can withstand, ie 45°C. I find this contention absolutely misconceived. In this context, SD1 from SIRIM had explained ambient temperature is the air temperature that surrounds the test item; it is not the surface temperature. In fact, at p 665 of the appeal records, the temperature in Putrajaya for the whole year of 2018 per month ranged at an average minimum temperature of 23°C and an average maximum temperature of 34°C. In this regard, the court is also entitled to take judicial notice that if ambient temperature (as opposed to surface temperature) is 52°C, Putrajaya would be hotter than the Sahara Desert! I therefore agree with the defendant's counsel that the photo taken by the plaintiff showing an alleged ambient temperature of 52°C remains doubtful due to: G H I

(a) the manner in which the plaintiff used to measure ambient temperature may not be accurate;

(b) the photo taken was the surface temperature and not ambient temperature;

(c) the thermometer's calibration and accuracy are not ascertained; and

(d) the location and time when the temperature was taken is not evident.

CAUSATION

[36] Finally, assuming I am wrong on all the above, SP1 confirmed the lights were tested before delivery and they were working. He further testified the lights were installed and the plaintiff had never rejected the lights. As such, the plaintiff is deemed to have accepted the lights under s 42 SOGA 1957. Having accepted the lights as evidenced by the delivery orders at pp 430, 431, 439 and 440 'in good order and condition', the plaintiff's only remedy, if any, is for damages for breach of warranty — see *Clariant Masterbatches (M) Sdn Bhd v Prestige Dynamics Industries Sdn Bhd* [2019] 3 MLJ 701 but the plaintiff has to prove damages and in so doing, the plaintiff must show a causal connection between the defendant's breach and its loss:

> Requirement of a causal connection. The important issue in remoteness of damage in the law of contract is whether a particular loss was within the reasonable contemplation of the parties, but causation must first be proved: there must be a causal connection between the defendant's breach of contract and the claimant's loss. The claimant may recover damages for a loss only where the breach of contract was the 'effective' or 'dominant' cause of that loss. The courts have avoided laying down any formal tests for causation: they have relied on common sense to guide decisions as to whether a breach of contract is a sufficiently substantial cause of the claimant's loss. The answer to whether the breach was the cause of the loss or merely the occasion for the loss must 'in the end' depend on 'the court's common sense' in interpreting the facts' — *Chitty on Contracts* (29th Ed) at paras 26–29.

[37] The Singapore Court of Appeal used the term 'factual link' and 'necessary link' between the breach and loss in *Robertson Quay Investment Pte Lt v Steen Consultants Pte Ltd and Another* [2008] SGCA 8.

[38] Causation was stressed in *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360:

> A word now about general principle. When a plaintiff claims damages from a defendant, he has to show that the loss in respect of which he claims damages was caused by the defendant's wrong, and also that the damages are not too remote to be recoverable.

[39] Considered as a whole, there appears no satisfactory evidence to prove the case on a balance of probabilities that the failure of the VarioLED to light up was due to defective VarioLED supplied. To recapitulate, SD2 forewarned

the plaintiff of the wrongful installation and this was fortified by the unchallenged LED Linear's report that the defendant caused the damage to VarioLED due to wrong installation. But this evidence was not considered by the LSCJ when on the other hand, there is simply no evidence adduced by the plaintiff that such allegations of wrongful installation are baseless, or are irrelevant and do not have the consequences as contended by the plaintiff. Causation was not established.

[40] Given the matters above, with all due respect, I am of the view that the findings by the LSCJ based on the evidence that the defendant has breached the contract by supplying defective VarioLED and that they did not meet the specification of a maximum ambient temperature of 50°C is clearly erroneous, and impeachable. These findings are against the weight of the evidence of SD1 and SD2 and the two reports.

[41] I thus agree with learned counsel for the defendant that the LSCJ had misdirected herself in law when dealing with the evidence including the two reports. By deciding that the two reports are irrelevant had resulted in the LSCJ:

(a) failing to properly evaluate the totality of the evidence;

(b) completely ignoring and shutting out crucial evidence favourable to the defendant;

(c) failing to evaluate and judicially appreciate the evidence before her and in particular the contents of both the two reports and oral testimonies on the same which were favourable to the defendant; and

(d) arriving at findings which were against the weight of the evidence elicited from the plaintiff's own witness under cross-examination.

[42] Central to appellate intervention, is that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the 'plainly wrong' test — *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 (FC) . In this regard, I have also borne in mind the most recent Federal Court pronouncement on the subject in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 1 LNS 1060 at [148] per Zabariah Mohd Yusof FCJ that so long as the trial judge's conclusion can be supported on a rational basis in view of the material evidence, the fact that the appellate court feels like it might have decided differently is irrelevant. In other words, a finding of fact that would not be repugnant to common sense ought not to be disturbed. The trial judge should be accorded a margin of appreciation when his treatment of the evidence is examined by the appellate courts.

A **[43]** Whilst I appreciate that the LSCJ heard the parties evidence at trial, and she had to wrestle with the minutiae of that evidence, and this court as such, should be slow to overturn primary findings of fact made by her, I am however satisfied that the LSCJ has clearly fallen into error in her insufficient appreciation of the evidence and was plainly wrong in concluding that the B plaintiff had proven its case on a balance of probabilities against the defendant. Her decision in allowing the plaintiff's claim is perverse and warrants appellate intervention.

[44] It follows for the reasons given that, I would allow this appeal and set C aside the order dated 11 February 2022 with costs of RM10,000 (costs here and below) to be paid by the plaintiff/respondent to the defendant/appellant.

Appeal allowed with costs.

D Reported by Ahmad Ismail

E

F

G

H

I